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In the Supreme Court of the United States

OCTOBER TERM, 1959

JOHN MORRIS, PETITIONER

v.

UNITED STATES OF AMERICA

ON MOTION TO PROCEED ON TYPEWRITTEN PAPERS AND ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION TO THE GRANTING OF THE PETITION FOR A WRIT OF CERTIORARI

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OPINION BELOW

The opinion of the court of appeals is not yet reported.

JURISDICTION

The judgment of the court of appeals was entered on July 13, 1959. By order of Mr. Justice Brennan, the time for filing the petition for a writ of certiorari was extended to September 1, 1959. The petition for a writ of certiorari was filed on August 28, 1959.

The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether petitioner, who is raising the question of entrapment for the first time in this Court, should have been acquitted on the ground that he was entrapped as a matter of law.

STATEMENT

Following a waiver in open court of a jury trial, petitioner, who was represented by counsel, was convicted under a three-count indictment charging him and others with federal narcotic violations on or about July 19 and July 29, 1957, and conspiracy to violate the narcotic laws (Tr. 56-58, 65, 963a).[1] Petitioner was sentenced as a second offender to concurrent terms of imprisonment: for 15 years and a payment of $5,000 on counts One and Two, and to a term of imprisonment of five years and a fine of $5,000 on count Three (Tr. 986). On appeal, the judgments of conviction were affirmed.

The evidence adduced at the trial may, so far as pertinent to the issue raised, be summarized as follows:

Special government employee Wilbert Fowler, a narcotics user, traveled from Washington, D. C., to New York with a narcotics agent on July 19, 1957 (Tr. 134-158). Fowler's purpose in coming to New

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[1] The designation "Tr." refers to the typewritten transcript of proceedings in the trial court.

York was to contact petitioner in order to purchase drugs (Tr. 157, 158). Although Fowler did not know where petitioner lived, he was advised by his acquaintances where petitioner could be located in New York (Tr. 158).[2] Fowler met petitioner at a street corner and asked him if he could get any narcotics. Petitioner told Fowler that it was "hot" in New York, but he probably could (Tr. 163-164). Petitioner said that he would see what he could do. Fowler denied on cross-examination that he told petitioner that he was sick and needed the drugs (Tr. 164). He testified that he told petitioner that he wanted to get large quantities of drugs to sell (Tr. 165). That evening, as pre-arranged with petitioner, Fowler met petitioner at the Braddock Bar. Thelma Penson, who was a co-defendant at the trial, was also there. Fowler introduced Federal Narcotics Agent Newkirk as his associate who was going to take the narcotics to Washington because he was "clean" (Tr. 88). At this time, Fowler complained of being sick (Tr. 191-192). Petitioner advised Fowler and Newkirk to go to his apartment building nearby and wait there, which they did. Within a short time, Thelma Penson arrived and let them into petitioner's apartment. She said that it would be some time before she would meet petitioner and secure the narcotics (Tr. 88-89).

About nine that evening, Thelma Penson left the apartment saying that she was going to meet peti-

[2] Fowler and petitioner became acquainted while they were in jail (Tr. 155-156).

tioner to get the narcotics. She asked for $270 as payment for the narcotics, which Agent Newkirk gave her. Fowler and Newkirk waited in the apartment for about three hours, and when Thelma Penson returned, she gave Agent Newkirk a brown paper bag which contained a glassine envelope which in turn contained a white powder. Thelma Penson said that she had obtained the narcotics from petitioner and that in the future, in order to get narcotics from petitioner, they would have to deal with her. She gave them her name and address. Fowler and Newkirk then left the apartment with the white powder, met the rest of the narcotics agents, and gave them the white powder for analysis. Upon analysis, the white powder was found to contain heroin (Tr. 88-92).

On July 25, 1957, Agent Newkirk himself tried to secure narcotics from petitioner through Thelma Penson. She did not obtain drugs that day, but a few days later, on July 29, she obtained two glassine envelopes containing heroin which she sold to Newkirk. During these few days, when the negotiations for the purchase of heroin were going on, co-defendants Penson and the Billings repeatedly made it clear to Newkirk that the drugs were being obtained from the petitioner (Tr. 263-265, 268-269, 369-372, 384-386, 384-387).

On July 31, 1957, Fowler, accompanied by Agent Newkirk, contacted petitioner at his shoe shine parlor in New York. Fowler complained about the quantity and quality of the second purchase of narcotics through Thelma Penson. Petitioner said that

although he knew about the first sale he did not know anything about the second. After further complaints by Fowler and Newkirk, petitioner denied knowledge of either sale of narcotics. He said that he had instructed Thelma Penson to return the money when the first attempted purchase was made (Tr. 94-95, 273, 274, 275, 318, 320-322, 717-740). Messrs. Fowler and Newkirk advised petitioner that they were still interested in purchasing heroin from him, and petitioner said he would see what he could do about getting better drugs. He made several telephone calls but was unsuccessful in then obtaining drugs (Tr. 96, 97, 215, 275-277).

Petitioner, testifying in his own behalf, denied the sale of any drugs. He admitted that he had seen Fowler on July 19, but said that they just talked. He denied that the meeting at the Braddock Bar was prearranged or that he authorized the use of his apartment. He said he told Fowler that he could do nothing about getting him drugs, and that he did not arrange any sales through Thelma Penson (Tr. 670-671, 695, 717-724, 730-733, 739-740, 758-759, 788). Thelma Penson testified that she obtained the narcotics for Fowler. She repudiated a statement, made after she was arrested, that she acted as an agent for petitioner (Tr. 545-606, 655-656).

ARGUMENT

Although no claim of entrapment was made at the trial or before the court of appeals, petitioner now claims that the trial judge, as the trier of fact, should have found that he was entrapped as a matter

of law. There is no merit in the contention. Although Fowler did come from Washington to contact petitioner, and did ask petitioner if he could get him narcotics, petitioner readily responded and arranged for the sale through Thelma Penson. Had the issue of entrapment been raised, the trial judge would have been justified in resolving the issue against petitioner. The mere fact that narcotics was first mentioned by the government agent does not establish entrapment as a matter of law. *Masciale* v. *United States*, 356 U.S. 386.

CONCLUSION

It is respectfully submitted that the petition for a writ of certiorari should be denied.

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